

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2107

To be argued by
FRANK H. SANTORO
Assistant United States Attorney

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2107

SEYMOUR POLLACK,

Appellant,

—v.—

GEORGE C. WILKINSON, Warden, Federal
Correctional Institution Danbury, Connecticut,
Appellee.

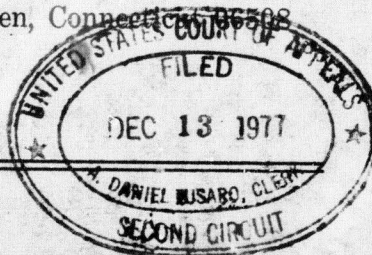
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

RICHARD BLUMENTHAL
*United States Attorney
District of Connecticut*

FRANK H. SANTORO
Assistant United States Attorney
270 Orange Street
P.O. Box 1824
New Haven, Connecticut 06508

KIRSTEN MISHKIN
Law Student Intern



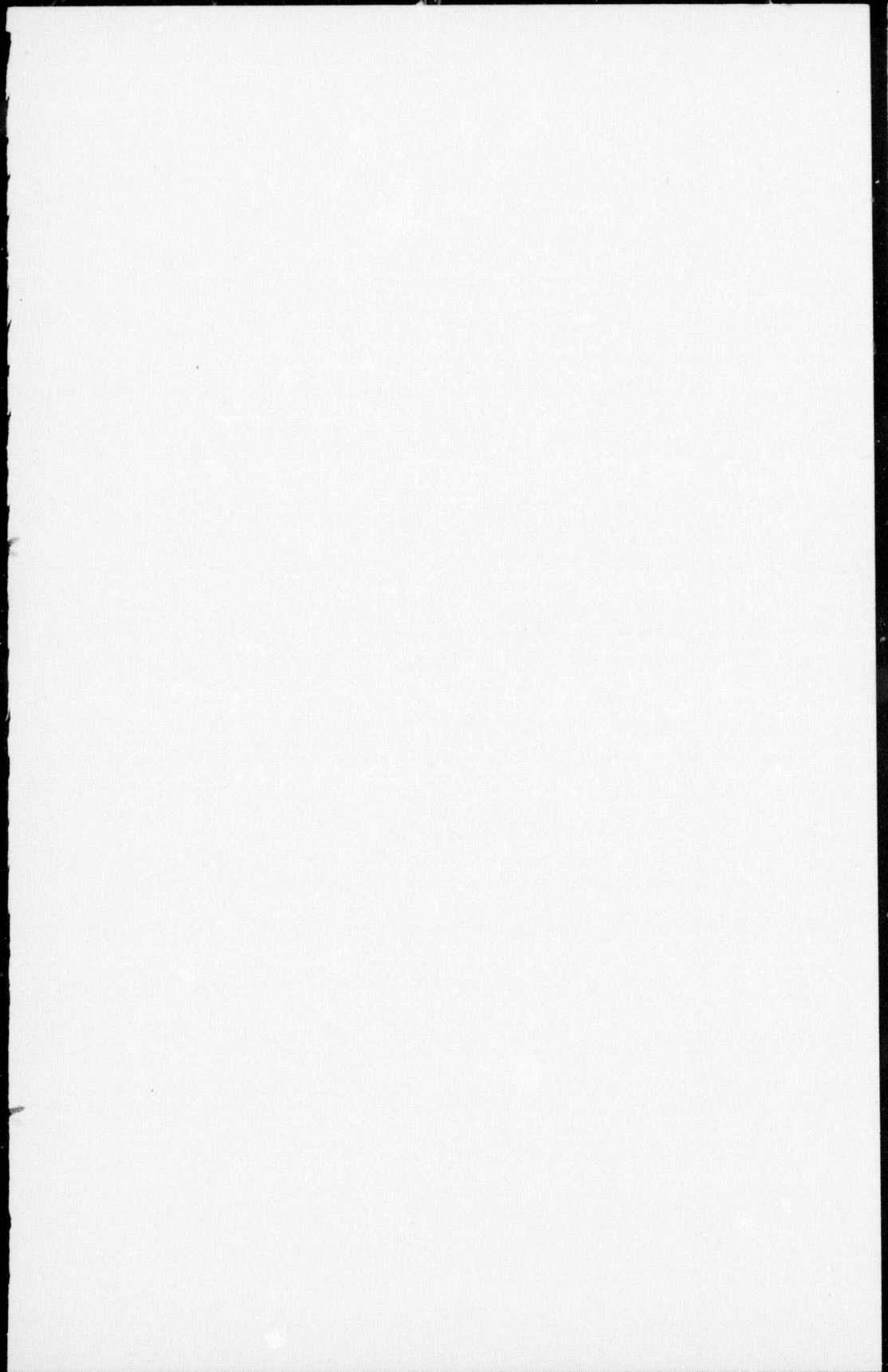


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statement of the Facts	2
Statement of the Issues	2
ARGUMENT:—Summary	2
I. The District Court was Correct in Dismissing Petitioner's Case as Moot	3
II. Petitioner has Failed to Exhaust his Ad- ministrative Remedies	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

<i>Aetna Life Insurance Co. v. Haworth</i> , 300 U.S. 227, 240-1 (1937)	4
<i>DeFunis v. Odegaard</i> , 416 U.S. 312, 319 (1974) ...	4
<i>Golden v. Zwickler</i> , 394 U.S. 103, 109 (1969)	8
<i>Jones v. Carlson</i> , 495 F.2d 209 (5th Cir. 1974)	9
<i>Kochie v. Norton</i> , 343 F. Supp. 956 (D. Conn. 1972)	9
<i>Moore v. Ogilvie</i> , 394 U.S. 814 (1969)	4
<i>North Carolina v. Rice</i> , 404 U.S. 244, 246 (1971)	3
<i>Preiser v. Newkirk</i> , 422 U.S. 395 (1975)	6, 8
<i>Rivera v. Toft</i> , 477 F.2d 534 (10th Cir. 1973)	9
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	8
<i>Ross v. Henderson</i> , 491 F.2d 116 (5th Cir. 1974) ...	9
<i>Stover v. Carlson</i> , 413 F. Supp. 718 (D. Conn. 1976)	2

	PAGE
<i>Super Tire Engineering Co. v. McCorkle</i> , 416 U.S. 115 (1974)	5, 6
<i>Thompson v. U.S. Prison Industries</i> , 492 F.2d 1082 (5th Cir. 1974)	9
<i>Thorne v. Warden, Brooklyn House of Detention for Men</i> , 479 F.2d 297 (2d Cir. 1973)	6
<i>Waddell v. Alldredge</i> , 480 F.2d 1078 (3d Cir. 1973)	9
<i>Weinstein v. Bradford</i> , 423 U.S. 147, 148 (1975) ...	4, 5
<i>Willis v. Ciccone</i> , 506 F.2d 1011 (8th Cir. 1974) ...	9
<i>U.S. ex rel Abate v. Malcolm</i> , 522 F.2d 826 (2d Cir. 1975)	7
<i>U.S. ex rel Blasser v. Follette</i> , 364 F.2d 319 (2d Cir. 1966)	7
<i>U.S. ex rel Machado v. Wilkins</i> , 423 F.2d 385, 386-7 (2d Cir. 1970)	4, 7, 8

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-2107

SEYMOUR POLLACK,

Appellant,

—v.—

GEORGE C. WILKINSON, Warden, Federal Correctional
Institution, Danbury, Connecticut,

Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

On February 28, 1977, petitioner Seymour Pollack filed a *pro se* Writ of Habeas Corpus claiming that prison officials at the Federal Correctional Institution had handled an item of his legal mail improperly. On July 13, 1977, a Memorandum of Decision of the Honorable Robert C. Zampano, United States District Judge, was filed, dismissing the petition as moot. In his decision Judge Zampano stated that his finding of mootness had been reached upon consideration of "all the circumstances," in particular, the fact that petitioner had been transferred to Lexington, Kentucky for medical reasons. Judge Zampano also referred to an affidavit from the Chief Correctional Supervisor at Danbury which declared that the Warden had issued explicit and detailed instructions for the handling of legal mail and that this procedure was the subject of correctional training and monitoring. The Judge assumed that Danbury officials would do their

utmost to comply with the Order. Petitioner's *pro se* appeal from that decision followed.

Statement of the Facts

A piece of legal mail addressed to Mr. Pollack was misdirected to the wrong unit at the Federal Prison at Danbury and when it was eventually delivered to him, it contained a three inch tear in the corner. An inquiry by Danbury officials was unable to determine how and when such tear occurred, but an affidavit was submitted representing that the institution maintained explicit procedures for observing and implementing the Court mandated procedure for handling legal mail of *Stover v. Carlson*, 413 F. Supp. 718 (D. Conn. 1976). Based on these facts the Government challenged Pollack's assertion that his mail was mishandled. In addition, an affidavit was submitted to the Court that Pollack had been transferred from Danbury to Lexington, Kentucky on February 7, 1977 for medical reasons.

Statement of the Issues

At issue in this appeal is the correctness of the District Court's decision dismissing Mr. Pollack's petition as moot. The Government also submits that Mr. Pollack's petition should be dismissed because he failed to exhaust his administrative remedies before seeking judicial review.

ARGUMENT

Summary

Because of his transfer, petitioner can no longer be affected by what happens at Danbury. There is no relief that a court can give him upon a Writ of Habeas Corpus. Both the Supreme Court and the Second Circuit have dismissed as moot cases in which no relief could be provided for the litigant.

Petitioner nevertheless asserts that his case should not be dismissed as moot because it is "capable of repetition yet evading review." Although the Supreme Court has employed the "capable of repetition yet evading review" doctrine to except certain kinds of challenges from the usual requirement of a continuing personal stake at all stages of the litigation, it has not extended that doctrine to include cases in which a change in an individual prisoner's circumstances terminated his opportunity for judicial review. Petitioner's claim of a possibility of repetition in his case is too speculative to constitute a justiciable case or controversy.

As well as being void on grounds of mootness, petitioner's claim should also be dismissed because he has failed to exhaust the administrative remedies available to him.

I.

The District Court was Correct in Dismissing Petitioner's Case as Moot.

A. Petitioner no longer has a personal stake in this litigation.

Since petitioner has been transferred to Lexington, he no longer has an interest in conditions of confinement at Danbury. No relief that a Court could provide would affect him. When a litigant no longer has a concrete interest in the outcome of an appeal, it has been the practice of the Supreme Court and the Second Circuit to dismiss the case as moot. In *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), the Supreme Court stated:

" . . . This Court has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."

Elsewhere, the Supreme Court declared that to be cognizable in a federal court, a suit

"must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character . . ." *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 240-1 (1937).

See also *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975); *U.S. ex rel Machado v. Wilkins*, 423 F.2d 385, 386-7 (2d. Cir. 1970).

B. Petitioner's suit does not fall within the category of cases "capable of repetition yet evading review", and thus does not qualify as an exception to the usual requirement of a continuing direct interest in the litigation.

Petitioner claims that his suit requires judicial consideration because it is "capable of repetition, yet evading review". The Supreme Court has developed the "capable of repetition yet evading review" doctrine to except from the usual requirement of a continuing personal stake in the litigation challenges which would otherwise never obtain appellate review. In such cases, the act challenged, by its very nature, would cease within the time required for appeal and so render the litigation moot. See, e.g., *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Roe v. Wade*, 410 U.S. 113 (1973).

The mere fact that petitioner's opportunity for judicial review was terminated by a change in the circumstances of his confinement does not bring his action within the doctrine. As the Supreme Court stated in *DeFunis v. Odegaard*, *supra*, at 319:

. . . "Just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school it hardly follows

that the issue he raises will in the future evade review."

The nature of a prisoner's life is such that it is subject to various, regularly occurring changes. He may enter the prison system on a pre-trial detainer, be released on bail, convicted, confined, transferred, paroled, and finally set free. It is to be expected that a legal challenge initiated during any one of these periods may not obtain a judicial hearing before the prisoner progresses to the next stage. Nevertheless, both the Supreme Court and the Second Circuit have refused to extend the "capable of repetition yet evading review" doctrine to such cases, even when they involve serious charges of denial of constitutional rights, unless a challenge to the validity of the conviction itself is involved.

In *Weinstein v. Bradford*, 423 U.S. 147 (1975), the Supreme Court held that since respondent was on parole by the time the case reached the Court, his claim that the Board of Parole was obliged under the Fourteenth Amendment to accord certain procedural rights was moot. In answer to respondent's argument that his suit was "capable of repetition yet evading review," the Court examined previous decisions and defined a two-pronged test when the doctrine was raised in the absence of a class action:

"(1) The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again . . ." *Weinstein v. Bradford*, *supra* at 149.

The Court found that the parolee's case failed to meet either requirement. Explaining its conclusion, it distinguished the parolee's case from that presented in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). With respect to the first requirement, the Court noted

that "the great majority of economic stakes do not last long enough for complete judicial review of the controversies they engender". *Super Tire Engineering Co. v. McCorkle*, *supra* at 125-6. With respect to the second requirement, the Court pointed out that *Super Tire Engineering Co. v. McCorkle* involved a cyclically recurring pattern, so that even though the particular stake which was the occasion for filing the lawsuit had ended, the government policy or action challenged continued to affect a present interest.

In *Preiser v. Newkirk*, 422 U. S. 395 (1975), Newkirk charged that his transfer to a maximum security prison, which provided fewer facilities and programs than he had previously enjoyed, violated his constitutional rights because it was made on the basis of unsubstantiated charges of union activity. He sought a declaratory judgment and an injunction. By the time the case reached the Supreme Court, Newkirk had been transferred again, first back to his former medium security prison, and then to a minimum security facility, where he would become eligible for parole in a matter of days. A memorandum explaining the nature of Newkirk's transfer and stating that it was to have no effect on his eligibility for parole or on decisions of the home-allowance committee had been placed in Newkirk's file. The Supreme Court noted that the suit was not a class action and that Newkirk had not sought damages. Since under all the circumstances, it saw no reasonable expectation of repetition, it held that the case did not fall within the category of harms capable of repetition yet evading review.

The Second Circuit held that a conviction rendered moot a challenge to the legality of pre-trial detention in *Thorne v. Warden, Brooklyn House of Detention for Men*, 479 F. 2d 297 (2d Cir. 1973). Thorne had filed a writ of habeas corpus after he had been kept in jail for almost a year without trial in the state court. However, he was tried and convicted before an appeal from the District

Court Order could be heard. Although the Court noted that the circumstances of which Thorne complained were not atypical, it concluded:

"Since Thorne is now held as a convicted defendant rather than merely on a criminal charge not yet brought to trial, the issue as to the legality of his continued pretrial detention has been mooted, and it therefore becomes unnecessary to resolve the constitutional issues presented . . .".
479 F.2d 297, 299.

In *United States ex rel. Blasser v. Follette*, 364 F.2d 319 (2d Cir. 1966), the Second Circuit found that a complaint that constitutional rights were violated during arrest was made moot by the fact that petitioner was on parole at the time of the appeal. Blasser claimed that he had been abducted from Massachusetts to New York, there to be imprisoned as a parole violator. *United States ex rel. Abate v. Malcolm*, 522 F. 2d 826 (2d Cir. 1975), involved a claim that failure to grant bail without stating reasons for denial violated constitutional rights. The Second Circuit dismissed the case as moot when the prisoner was released on bail pending appeal in New York courts. In *United States ex rel. Machado v. Wilkins*, *supra*, Machado had filed a habeas petition challenging the augmented sentence which a New York court had imposed. Machado claimed that the longer sentence was given because of a California proceeding which should not have been considered a felony conviction. Since Machado had already served his New York sentence, the case was dismissed as moot by the Second Circuit.

As in the above cases, Pollack's petition challenges conditions pertaining to a situation of confinement that no longer exists. Like them, it does not belong to a class of cases which, by nature of the action challenged, will regularly evade review. Nor is there a reasonable expectation that petitioner would be subject again to the same alleged action.

Petitioner asserts that repetition is possible in his case. He claims that at some time in the future he may be transferred back to Danbury. Such a possibility is at this point too speculative to render Pollack's suit a justiciable case or controversy. In the very case that petitioner cites in his brief, *Roe v. Wade*, 410 U.S. 113 (1973), the Court dismissed the accompanying Mary and John Doe complaint on the grounds that it was too speculative to be justiciable. Mary Doe had received medical advice that she should avoid pregnancy. The Supreme Court said:

"Their alleged injury rests on possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of Health . . .". 410 U.S. 113, 128.

See also *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975), *Golden v. Zwickler*, 394 U.S. 103, 109-110 (1969); *United States ex rel. Machado v. Wilkins*, *supra*, at 387.

II.

Petitioner has Failed to Exhaust his Administrative Remedies.

Bureau of Prisons Policy Statement 2001.6A provides an administrative procedure for the resolution of prisoners' complaints. Final appeal under the procedure is made to the Director of the Bureau of Prisons. The policy statement provides a time limit within which the Bureau must answer such complaints and goes on to state that if the time limit expires without a reply, it will be deemed to be a denial of the request. If dissatisfied with administrative response to his complaint, the prisoner may file suit in an appropriate court. Attached to his judicial complaint must be documentary proof that he has exhausted his administrative remedies. Courts have upheld the requirement of exhaustion of administrative remedies

in prisoner actions before institution of suit. See *Thompson v. U.S. Prison Industries*, 492 F.2d 1082 (5th Cir. 1974); *Jones v. Carlson*, 495 F.2d 209 (5th Cir. 1974); *Waddell v. Alldredge*, 480 F.2d 1078 (2d Cir. 1973); *Ross v. Henderson*, 491 F.2d 116 (5th Cir. 1974); *Willis v. Ciccone*, 506 F.2d 1011 (8th Cir. 1974); *Rivera v. Taft*, 477 F.2d 534 (10th Cir. 1973); *Kochie v. Norton*, 343 F. Supp. 956 (D. Conn. 1972).

There is no proof that appellant exhausted his administrative remedies before filing a petition with the District Court. Therefore, the appeal should be dismissed.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

RICHARD BLUMENTHAL
United States Attorney

By: FRANK H. SANTORO
Assistant United States Attorney

KIRSTEN MISHKIN
Law Student Intern

★ U. S. Government Printing Office 1977— 714-063-ACT-304

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-2107

SEYMOUR POLLACK,
APPELLANT,

V.

GEORGE WILKINSON, WARDEN,
APPELLEE

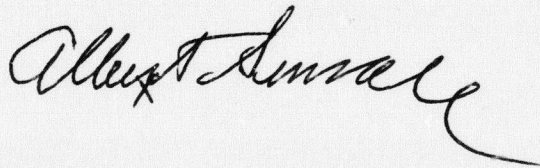
AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale _____, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue, Brooklyn, New York

That on the 13th day of December, 1977, deponent served the within Brief upon Mr. Seymour Pollack-Extended Care Unit I.F.C.I., Box 2000, Lexington, Kentucky 40511

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,



This 13th day of December, 1977

Joseph E. Buselmeier
Notary Public, State of New York
No. 24-5547675 Qual. in Kings County
Commission Expires March 30, 1978